88-1955

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

KEMPER BAKER CRABB, JR.,
MICHAEL PATRICK LARKIN,
KEVIN JUDE LARKIN,
JON MARSH,
RANDY ALAN ROGERS,
THOMAS A. ZAKES,

Petitioners,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First Supreme Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it ruled that the evidence did not support Petitioners' claim to the defense of third person, *Tex. Penal Code*, § 9.33, one aspect of which defense encompassed a collateral attack against *Roe v. Wade*, 410 U.S. 113 (1973), on constitutional and jurisdictional grounds;

2. Whether the Court of Appeals erred when it upheld the Trial Court's (1) exclusion of evidence from five of the Petitioners on bills of exceptions concerning the defense of third person and (2) denial of a certain special instruction to the Jury on such defense which encompassed such collateral attack;

3. Whether this Court should reconsider and overrule *Roe* as violative of the U.S. Constitution and of fundamental principles of personal jurisdiction; and

4. Whether, in the alternative to granting of the Petition for a Writ of Certiorari herein, the Court should hold the Petition for disposition until after it decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605, probable jurisdiction noted on January 9, 1989.

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OPINION BELOW

The Opinion of the Court of Appeals is set forth in the Appendix hereto (Pet. App. 1-17). A portion of it is reported at 754 S.W. 2d 742. The balance is not reported.

JURISDICTION

The Judgment of the Court of Appeals was dated and rendered on May 26, 1988 (Pet. App. 18). A timely Motion for Rehearing was overruled by that Court on June 30, 1988. On February 22, 1989, the Court of Criminal Appeals of Texas refused Petitioners' Joint Petition for Discretionary Review (Pet. App. 21-24). A timely Joint Motion for Rehearing was denied by that Court on April 5, 1989 (Pet. App. 25-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION:

5th Amendment:

* * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *.

14th Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * * [N]or shall any State

deprive any person of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

By Informations filed in County Criminal Court at Law No. 5 of Harris County, Texas ("Trial Court"), Petitioners were charged with criminal trespass of a certain building in Harris County, Texas, by entering and remaining therein after receipt of notice to depart, in violation of *Tex. Penal Code*, § 30.05. The building in question was the West Loop Clinic, which is an abortion clinic located in Houston, Harris County, Texas ("Clinic").

Following a joint trial by a 6-person Jury in April 1987, Petitioners were found guilty as charged. The jury fixed punishment of varying fines and jail terms, but recommended that the jail terms be probated for certain periods. The Trial Court sentenced Petitioners in accordance therewith, imposing fines which were not probated and jail sentences which were probated.[1]

On appeal, the Court of Appeals affirmed all such Judgments and overruled subsequently Petitioners'

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[1] The precise sentences are: Petitioner Michael Patrick Larkin, 90 days in jail probated for 90 days and a fine of $200.00 which was not probated; all remaining Petitioners, 180 days in jail probated for 180 days each and fines of $900.00 each which were not probated. In addition, the conditions of probation for each Petitioner required the performance of a certain number of hours of community service as follows: 30 hours for Michael Patrick Larkin; 40 hours each for Petitioners Crabb and Marsh; and 60 hours each for Petitioners Kevin Larkin, Rogers and Zakes.

Motion for Rehearing. The Court of Criminal Appeals refused Petitioners' Joint Petition for Discretionary Review and denied subsequently their timely Joint Motion for Rehearing.

A. **Certain Trial Evidence.** 1. *The Trespasses.* On September 20, 1986, Petitioners and 13 others entered the Clinic and located themselves primarily in a large waiting area. Members of the group banged on the walls, shouted, sang songs and/or prayed. Some read from the Bible. The front door of the Clinic was "chained shut"; an emergency door on the side of the Clinic was blocked by a van parked against it but, while it was difficult, people were able to go in or out; and an interior doorway of the Clinic was blocked by chairs chained together and by people (S.F. 17, 31, 80-81, 110, 111, 193). A large number of protesters were outside the Clinic. The Houston Police Department was contacted and a number of police officers responded or arrived on the scene during the protest. The Clinic Director and certain police officers requested the protesters inside the Clinic to leave. One left, but Petitioners and 12 others did not and were arrested subsequently. [Petitioner Crabb and another were chained to a chair. Crabb did not desire to leave, nor did he request the officer with bolt cutters to cut the chains after the Clinic Director requested the group to leave (S.F. 442, 443).]

2. *Abortions.* While "procedures" were scheduled that day at the Clinic, they were suspended during the beginning of the protest but were resumed toward the end of it, with a police officer in each procedure room (S.F. 96-97, 211, 213). All of the 2-day procedures were

completed that day and about half of the others. Procedures were rescheduled but it was not known whether 100% of them were rescheduled. About 10 women entered the Clinic for "terminations" during the protest; others did not keep their appointments (S.F. 70).

3. *Certain Testimony of the Petitioners.* All of the Petitioners testified in their own defense. *Petitioner Zakes'* object in going into the waiting room of the clinic that morning was that "[w]e wanted to prevent the medical procedures that were occurring in that building" (S.F. 362). *Petitioner Kevin Larkin's* purpose in entering the lobby was "[t]o cause a distraction so that abortions could not be done inside the clinic that day" (S.F. 394-395). *Petitioner Rogers'* purpose in going in was "[t]o save babies" (S.F. 408). *Petitioner Michael Larkin's* conscious desire was "[t]o stop them from ending – destroying babies that day" (S.F. 448-449). *Petitioner Marsh* testified, in part, that he was involved (that day) in a "nonviolent protest and rescue mission", and that he was "very concerned" about pregnant women going to the Clinic for "procedures" that day (S.F. 422, 424). *Petitioner Crabb* and another person were chained to a chair inside the clinic (S.F. 435, 441-442). Petitioners chanted or sang, and some slapped or banged on the walls of the Clinic. Some prayed. According to Zakes, "[w]e made a lot of noise, we slapped the walls, we sang. * * * [A]nd we did everything we could to make as much noise as possible", the purpose being that "[i]t is very difficult to perform medical procedures in a noisy environment" (S.F. 361-362).

B. **Certain Testimony on Bills of Exceptions.** Five of the Petitioners (all but Michael Larkin) testified outside

the presence of the Jury on bills of exceptions. Briefly, three of them were concerned about injury or damage to the pregnant women at the Clinic, and all five were concerned about the lives of the affected unborn children (S.F. 483-484, 485, 489, 493-494, 496, 501-502, 507-508, 517-518). Four viewed the situation at the Clinic as an emergency one (S.F. 496, 502, 508, 518). Zakes perceived the situation as one involving "a serious immediate threat of injury to pregnant women and to their unborn children, which called for immediate action" (S.F. 489). Four perceived the danger or threat of injury to be imminent or immediate (S.F. 489, 502, 508, 518). All five addressed the situation with their presence and conduct. Two considered that they placed themselves between the doctor(s) and the women (S.F. 495, 518-519). Zakes testified, in part (S.F. 489):

> The immediate action I took was entering the waiting room, blocked the door in not allowing – what I thought would not allow people to enter into the place where the abortions were being performed and for the women who I later found had entered into the back part of the building. I made a large amount of noise which was calculated by the sure volume of it to interfere with the procedures and by the words that were spoken to discourage women of having abortions and to discourage the staff from helping on the abortions.

Six or "at least six" women changed their minds about abortion at the Clinic that day (S.F. 504, 508-509, 519).

C. **Request for Special Jury Instructions.** The Defense presented five special instructions to the Jury – one on the defense of necessity, three on the defense of third person and one on the defense of protection of life

or health (Tr. all Petitioners, 100-109; S.F. 528-531). One of the instructions on the defense of third person was based on the unlawfulness of abortion under Texas statutory law before this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and provided, in pertinent part (Tr. all Petitioners, 106):

> You are instructed further that it is unlawful for any person in Texas to administer designedly to a pregnant female or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatever externally or internally applied to procure thereby an abortion except where abortion is procured or attempted by medical advice for the purpose of saving the life of the mother. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the women's womb or that a premature birth thereof be caused.

Defense Counsel argued, in part, that *Roe* was unconstitutional (S.F. 529-530). The Trial Court said that it was leaving the charge as it was – denying in effect all such special instructions (S.F. 531).

D. **Federal Questions.** The defense of third person requires that the third person for whom the actor intervenes be subjected to *unlawful* force or *unlawful* deadly force *(Tex. Penal Code*, § 9.33). As shown above, the Jury heard some, but not all, of the defensive evidence, and the Trial Court denied, in effect, Petitioners' special instruction based on the unlawfulness of abortion under Texas statutory law before this Court (said instruction").

On appeal, Petitioners contended, *inter alia*, that the evidence was sufficient to raise the defense of third person; that the unlawful force element of the defense of

third person was met by abortion, including that "abortion is unlawful under Texas anti-abortion law which is still in effect because *Roe v. Wade* * * * which purported to hold such law unconstitutional is itself void as violative of the U.S. Constitution and laws and fundamental principles of personal jurisdiction";[2] that *Roe* was void on various constitutional and jurisdictional bases; that "third person" under the defense of third person included the pregnant female and her unborn child; that the Trial Court erred in denying said instruction; and that the Trial Court erred in not allowing the Jury to hear evidence on the bills of exception of Petitioners Crabb, Kevin Larkin, Marsh, Rogers and Zakes because it was relevant and material to such defense (Brief of Appellants in *Crabb et al v. Texas*, Tex. App., 1st Dist., pp. 37-45, 58-73).

The Court of Appeals ignored Petitioners' collateral attack against *Roe*. In addition, it determined that the evidence did not support Petitioners' claim to the defense of third person due to its claim of the absence of unlawful force and to its claim that "fetuses" were not persons under Texas law; upheld the Trial Court's exclusion of such evidence; and upheld the Trial Court's denial of said instruction. Petitioners challenged these rulings (and others) and pressed their collateral attack against *Roe* before that Court (on Motion for Rehearing) and before the Court of Criminal Appeals (on Joint Petition for Discretionary Review and on Joint Motion for Rehearing). Such challenges and collateral attack were unsuccessful.

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[2] For the text of former *Tex. Penal Code* arts. 1191-1194, 1196, see *Roe*, 410 U.S. at fn. 1, p. 117.

The alternative question (no. 4) to the granting of the Petition, i.e., whether this Court should hold the Petition for disposition until after it decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605, probable jurisdiction noted and oral argument heard, was not raised below. It is a matter strictly for this Court.

ARGUMENT

I.

THE TEXAS STATUTORY DEFENSE OF THIRD PERSON, WHICH ENCOMPASSED IN THIS CASE A COLLATERAL ATTACK AGAINST ROE V. WADE ON CONSTITUTIONAL AND JURISDICTIONAL GROUNDS, WAS APPLICABLE AND SUPPORTED EVIDENTIALLY

At the trial, Petitioners raised the Texas statutory defense of third person, *Tex. Penal Code*, 9.33 (as well as the statutory defenses of necessity and protection of life or health). Section 9.33 provides as follows:

> A person is justified in using force or deadly force against another to protect a third person if:
>
> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the *unlawful force* or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
>
> (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person. (Emphasis added.)

Petitioners maintained that the "unlawful force" involved was that of abortion since that practice violates, *inter alia*, the Texas anti-abortion laws which this Court purported to hold unconstitutional in *Roe v. Wade, supra*, 413 U.S.

113,[3] and that such laws are still in effect because *Roe* itself is void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction.

The Court of Appeals ruled that the evidence did not support Petitioners' claim to the defense of third person since (1) "[t]here was no evidence that unlawful force was being used against the women in the clinic", and (2) "fetuses are not 'persons' under Texas law" (Pet. App. 5). It upheld the Trial Court's (1) exclusion of the evidence on bills of exceptions of Petitioners Crabb, Kevin Larkin, Marsh, Rogers and Zakes, *supra*, and (2) denial of said instruction.

The Court, however, *ignored completely* Petitioners' collateral attack against *Roe* as well as other argument and authority before it and, as a result, erred in upholding such actions by the Trial Court.

As shown in Section II of this Petition, such attack is valid, and *Roe* is void as violative of the U.S. Constitution

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[3] Abortion violates also (1) Texas tort law of assault, battery and negligence *vis-a-vis* unborn children, "unlwful" being defined as criminal and/or tortious [*Tex. Penal Code*, § 1.07(a)(36)], and (2) Texas anti-abortion law revived as a legal effect of *Roe* (assuming *Roe* to be a valid decision), such law being of supremacy status under Article VI (Supremacy Clause) since carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord between the United States and the Republic of Texas. The three requested special instructions to the Jury on the defense of third person – which the Trial Court denied in effect – postured the unlawful force element in accordance with the three areas of illegality, with a different area of illegality for each such special instruction.

and fundamental principles of personal jurisdiction. This means that the abortion conduct at the Clinic constituted the necessary unlawful force under Section 9.33, and the Court erred in not recognizing the same. Unborn children are protected under such law.

As for the Court's claim that "fetuses are not 'persons' under Texas law", the short answer is that Section 9.33 speaks in terms of "third person", not "person", and that since "third person" is not defined in the *Texas Penal Code*, resort to the Code Construction Act, *Vernon's Tex. Civ. Stat. Ann.* art. 5429b-2, was required.[4] *Tex. Penal Code*, § 1.05(b). Had the common usage or understanding standard of that Act been applied, "third person" would have included a pregnant female *and* her unborn child. See *Webster's Third New Inter-National Dictionary of the English Language, Unabridged* (G & C Merriam Co., Springfield, Mass.) (1971), pp. 1686 ("person" as an individual human being) and 338 ("child" as an "*unborn* or recently born *human being*"). (Emphasis added.) Moreover, the claim rings hollow since the legal status and rights posture of unborn children are well established under Texas law. See pp. 15-17, below.

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[4] Accordingly, the Court's use of the *Texas Penal Code* definitions of "person" and "individual" is misplaced; and so is its citation of *Ogas v. State*, 655 S.W. 2d 322, 325 (Tex. App. – Amarillo 1983, no pet.), which used such definitions in holding that an unborn child was not a person under Section 9.33. *Witty v. American General Ins. Co.*, 727 S.W. 2d 503 (Tex. 1987), involved an interpretation of the Texas Wrongful Death Act.

II.

ROE V. WADE SHOULD BE OVERRULED AS VIOLATIVE OF THE U.S. CONSTITUTION AND FUNDAMENTAL PRINCIPLES OF PERSONAL JURISDICTION

A. **Threshold Matters.** At the threshold, it is well established that if a court in the United States violates the U.S. Constitution in a proceeding before it, *it loses jurisdiction to proceed to judgment*, and any "judgment" which it might enter would be *void*. See *Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh*, 93 U.S. 274, 277-284 (1876). This Court is capable of violating the U.S. Constitution. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78, 79-80 (1938), where the Court even *admitted* that it and lower federal courts had done so with application of the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842). Compare *Plessy v. Ferguson*, 167 U.S. 537 (1896), with *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Since it is difficult at best to amend the Constitution, the Court should be sensitive to calls for re-examination under appropriate circumstances. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J. dissenting).

B. **Roe v. Wade Violates the U.S. Constitution and Fundamental Principles of Personal Jurisdiction.** Petitioners submit respectfully that *Roe* should be overruled as violative of the U.S. Constitution and fundamental principles of personal jurisdiction. Supportive positions are presented below.

1. *No Representation.* Neither abortion "survivor" children nor unborn children threatened and endangered by abortion were represented before the U.S. District

Court or this Court in *Roe*. Abortion "survivor" children born in this country are U.S. citizens (with extremely minor exceptions), yet they are doomed to die and die primarily due to prematurity, abortional injury or lack of care. Unborn children, with well recognized legal postures under the laws of the United States, Texas and other States, are killed outright by abortion. Abortion "survivors" and unborn children are persons or entities with legal personalities under the Due Process Clause of the 5th Amendment to the U.S. Constitution. The Judgments of the U.S. District Court and this Court in *Roe*, rendered without any representation of such victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivations of life, liberty and property without due process of law, in violation of such 5th Amendment. Accordingly, such Judgments are unconstitutional and void as to them. See U.S. Const., 5th Amendment (Due Process Clause); *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885) (Unborn Children); *Pennoyer v. Neff*, 95 U.S. 714, 733-734 (1878) (U.S. Citizens); Rule 19, *F.R. Civ. Proc.*

2. *No Personal Jurisdiction*. Neither the U.S. District Court nor this Court had personal jurisdiction over such abortion "survivor" children or unborn children in *Roe*. Yet such Children were affected vitally by those proceedings, and had a right to be before the Courts through next friends or guardians (or by counsel for such guardians or next friends). The Judgments of such Courts, therefore, were unconstitutional and void as to them. *Ibid.*

Moreover, this deficiency operated to divest the U.S. District Court and this Court of authority to pronounce judgment affecting them personally. Neither the unborn

children who were conceived and killed by abortion after *Roe* nor the abortion "survivor" children after *Roe* could be affected jurisdictionally be *Roe* in their rights posture, yet they die from *Roe*. The Judgments of such Courts, rendered without personal jurisdiction over such infant victims, are void as violative of fundamental principles of personal jurisdiction. See *McArthur v. Scott, supra,* 113 U.S. at 391-392, 404; *Pennoyer v. Neff, supra,* 95 U.S. at 733-734.

3. *Invidious Discriminations.* The discriminations perpetrated in *Roe* against abortion "survivors" and unborn children as compared to the nonaborted born and corporations are invidious and deprive such children of life, liberty and property without due process of law, in violation of the 5th Amendment to the U.S. Constitution. Corporations, which are artificial beings and not mentioned in the Constitution, are "persons" under the Due Process Clause of such 5th Amendment and under the Due Process and Equal Protection Clauses of the 14th Amendment thereof, while actual unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are denied such personhood. A prematurely born child of 7-month gestational age has 14th Amendment personhood while an older and more developed unborn child of 8-months gestational age does not. Such crazy guilt discriminations are violative patently of due process under such Amendment.

4. *Failure To Apply Levy v. Louisiana, 391 U.S. 68 (1968), Concerning Human Personhood Under the 14th Amendment.* The Court failed to apply the "live," "human" and "having a being" test of 14th Amendment personhood postulated by it in *Levy v. Louisiana,* 391 U.S.

68 (1968), to the affected unborn children. If a constitutional interpretive decision can be overlooked or disregarded, how can it be maintained that such a decision has "law of the land" ranking? See U.S. Const., Art. VI (Supremacy Clause).

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate at birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the self-same person before birth, only at a different developmental stage. The human genetic code is present at fertilization.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment.* While "liberty" is a broad concept, "life" is the most basic of rights for, without it, all other rights and interests are meaningless. Where was the correlation between "liberty" and the right to destroy unborn life? Or the basis for the "fundamental" ranking of such right? Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Not only was abortion a crime at common law and in Texas, but the legal and social heritage of this Nation viewed abortion not as a "right" but as a naked wrong. Moreover, the Constitution protects the life rights of persons against certain governmental deprivations, and *nowhere* does it give any human being the right to destroy the life of another. If the implied rights decisions of this Court were applied properly, the life right of the unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivations of Rights.* The Due Process Clause of the 5th Amendment stood as a bar to this Court's Judgment in *Roe* which endangered the rights of abortion "survivors" and authorized the destruction of a large body of legally cognizable rights of the unborn. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Munn v. Illinois*, 94 U.S. 113, 130 (O.T., 1886).

In Texas, an abortion "survivor" would be a U.S. and Texas Citizen (with extremely minor exceptions) per the Citizenship Clause of the 14th Amendment, U.S. Constitution, and entitled to citizen protections under Article I, Section 19, of the Texas Constitution; a "person" within the protective reach of the Due Process and Equal Protection Clauses of such Amendment; a "person" within the "open courts" provision of Article I, Section 13, of the Texas Constitution; an "individual" within the protection of the *Texas Penal Code* [See *Tex. Penal Code*, § 1.07(a)(17).]; a "child" under the *Texas Family Code*, § 11.01(1), and the tort law of Texas; and would have the same rights, powers and privileges of a child born in Texas after the normal gestation period (*Tex. Family Code*, § 12.05).[5]

Similarly, unborn children are recognized legally and have substantial legal rights in Texas, etc. Since rights

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[5] This Court appeared to be unaware that children might survive abortions. Yet children are born alive after abortions. See, e.g., *Showery v. State*, 690 S.W. 2d 689, 694, 695-696 (Tex. App. – El Paso, 1985, pet. dis. rev. ref.). They exist in the most monstrously hostile environment imaginable for a defenseless child – where the "mother" abandons her child, where the abortionist is paid (in most cases) to deliver a dead baby, and where the attendants are employees of the abortionist or the abortion facility.

cannot and do not exist *in vacuo*, legal statuses stem therefrom.[6] For example, an unborn child is recognized under the prenatal tort injury doctrine [*Yandell v. Delgado*, 471 S.W. 2d 569 (Tex. 1971)]; is entitled to receive a monetary award for the wrongful death of his father

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[6] Under English law, the legal status and rights posture of an unborn child was recognized by a substantial body of law, statutory and case. E.g., 12 Ch. II, c. 24, §§ VIII and IX (1660) (representation by a testamentary guardian, with authority to sue to protect the interests of the unborn child); *Reeve v. Long*, 83 E. Repts. 754 (House of Lords, 1695) (vesting of a remainder interest in real property), as codified in 10 & 11 Wm. III, c. 16 (1699); *Lutterel's Case* (c. 1660), referred to in *Hale v. Hale*, 24 E. Repts. 25, 26 (Ch., 1692) (representation in judicial proceeding and award of an injunction to stay waste of property interests). The unborn child was considered a "Person in rerum Natura" [*Wallis v. Hodson*, 27 E. Repts. 642, 643-644 (Ch., 1740)]; was "in esse, according to the rule of the civil law" [*Millar v. Turner*, 27 E. Repts. 907, 908 (Ch., 1747-1748); had "an existence in the eye of the law" [*Burdet v. Hopegood*, 24 E. Repts. 484 (Ch., 1718)]; and was "living * * * in ventre sa mere" [*Beale v. Beale*, 24 E. Repts. 373 (Ch., 1713)].

On the criminal side, abortion of a live unborn child was an offense at common law [e.g., Blackstone, *Commentaries on the Laws of England*, Vol. I (c. 1765), pp. 129-130, and Vol. IV (c. 1769), p. 198; see III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801], and continued so into the laws of this country [e.g., II *Wharton's Criminal Law* (14th ed., by Charles E. Torcia, 1979), § 250, p. 415; Swift, *A System of Laws of the State of Connecticut*, Vol. I (1795), pp. 177-178, and Vol. II, p. 299; *Mills v. The Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle*, 83 N.C. 544 (S.C.N.C., 1880)]. "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904).

[*Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App. – Eastland, 1931), no writ]; is entitled to be represented in judicial proceedings which affect him or her [*McArthur v. Scott, supra*, 113 U.S. at 391-392, 404 (involving unborn children not even in gestation)]; is entitled to have his or her mother undergo a life-saving blood transfusion [*Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537, 538 (S.C.N.J., 1964), *cert. denied*, 337 U.S. 985 (pregnancy beyond the 32nd week, p. 537; remand, court directed trial court, *inter alia*, "to appoint a special guardian for the infant", p. 538)]; and is entitled to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* [*Tex. Employers' Ins. Co. v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969)]. A remainder interest in real property may vest in an unborn child [*Crisfield v. Storr*, 36 Md. 129, 146 (Ct. App. Md., 1872)]. So too with a beneficial interest under a trust [*Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga., 1927)].[7]

8. *Manufacture of the Right of Abortion, Etc.* In *Roe*, this Court violated Article III of the U.S. Constitution by *creating* a constitutional liberty of abortion and by restricting the states of *their* reserved constitutional authorities to legislate in this area of substantial state

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[7] Under Texas statutory law, a suit to terminate the parent/child relationship may be brought after the first trimester of pregnancy (*Tex. Family Code*, § 15.021), and the unborn child is to be represented therein, with exceptions not here pertinent [See *id.*, § 11.10(a).]. Further, children who were unborn at the time of the death of their father or other relation may take, as posthumous children, under the intestate laws of Texas or under the will of their father. See *Tex. Probate Code*, §§ 41(a), 67(b).

interest. Cf. *Bowers v. Hardwick, supra,* 478 U.S. 186. This violated also the division of powers concept, as recognized in the 10th Amendment to the Constitution. See *Erie R. Co. v. Tompkins, supra,* 304 U.S. at 77-78, 79-80.

III.

IN THE ALTERNATIVE, THE COURT SHOULD HOLD THIS CASE UNTIL AFTER DISPOSITION OF THE APPEAL IN WEBSTER V. REPRODUCTIVE HEALTH SERVICES, NO. 88-605

If the Court does not grant the within Petition, Petitioners request the Court to hold the same for disposition until after the Court decides the appeal in *Webster v. Reproductive Health Services,* No. 88-605, probable jurisdiction noted on January 9, 1989, and oral argument heard on April 26, 1989, since the Court may decide to reconsider and overrule *Roe* in that case. Petitioners believe that *Webster* extends to the Court an opportunity to do just that, and that many Amici Curiae in support of the Appellants in that case, including the United States through the Office of Solicitor General, are seeking such reconsideration and overrule therein. If the Court overrules *Roe,* Petitioners submit that that should impact favorably upon their cases *vis-a-vis* the interpretation or application of *Tex. Penal Code,* § 9.33, thereto. See pp. 8-10, above.

CONCLUSION

For the reasons and authorities set forth, above, Petitioners submit respectfully that the Petition for a Writ of

Certiorari should be granted or, in the alternative, that the Court should hold the Petition for disposition until after it decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605.

Respectfully submitted,

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Attorney of Record
for Petitioners

APPENDIX

OPINION OF THE COURT OF APPEALS

(May 26, 1988)

(SEAL)

OPINION

In The

COURT OF APPEALS

For The

FIRST DISTRICT OF TEXAS

NO. 01-87-00379-CR
NO. 01-87-00380-CR
NO. 01-87-00381-CR
NO. 01-87-00382-CR
NO. 01-87-00383-CR
NO. 01-87-00384-CR

KEMPER BAKER CRABB, JR., MICHAEL PATRICK LARKIN, KEVIN JUDE LARKIN, JON MARSH, RANDY ALLAN ROGERS, THOMAS A. ZAKES,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5 of Harris County, Texas
Trial Court Cause Nos. 912,852, 912,858, 912,859, 912,860, 912,865, 912,867

This case requires us to decide whether trespass at an abortion clinic was legally justified in order to protect life and health; to defend third persons; or due to necessity.

We must also decide whether appellants' rights to free speech were violated when the trial court ordered them not to picket or demonstrate at the clinic while on probation. Finding that the trespass was not justified under the penal code, and that the condition of probation is not unconstitutional, we affirm the judgment.

In a joint jury trial, appellants were found guilty of criminal trespass of a building housing an abortion clinic. The jury assessed appellant Michael Patrick Larkin 90 days in jail and a $200 fine, and the remaining five appellants 180 days in jail and a $900 fine each. The jail sentences were probated, and, as a condition of probation, each appellant was required to refrain from "picketing or demonstrating at [the] West Loop Clinic at 5607 Schumacher."

On September 20, 1986, Karen Jones and Michele Wilson, employees at an abortion clinic located at 2909 West Loop South, in Harris County, observed a group of about 19 people in the clinic's lobby. The group chanted, beat the walls, and shouted at staff members that, "abortion is murder." The employees discovered that the front doors of the clinic had been chained shut. The door from the lobby to the back of the clinic was blocked by people and chairs that had been chained together. Employee Caroline Walker and several patients in the lobby were forced to come trough the reception window from the lobby into the clinic.

A sign on the front door of the clinic stated that only persons with clinic business were allowed on the premises. The appellants and 12 others remained in the clinic's

lobby without conducting any business for the next four hours.

Police officers saw 150 to 200 people gathered in the front of the clinic. The first officer on the scene saw that the front door had been chained shut and that the side entrance was blocked by a van. Squeezing through the side entrance, the officer spoke through the reception window and told the people in the lobby to leave. None left. In the presence of police officers, Evicel Ortega, the clinic's administrator and the complaining witness herein, told the people in the lobby to leave. They did not leave, whereupon the appellants were arrested.

In points of error four through 11, the appellants contend that the trial court deprived them of due process of law when it granted the State's motion in limine and excluded testimony from each appellant, medical testimony from Dr. Steven Hotze, and testimony from Ortega.

The court excluded Dr. Hotze's expert testimony concerning abortions and related procedures. This, appellants claim, undercut their ability to raise their defenses of necessity, defense of third person, and defense of protection of life or health. Dr. Hotze's excluded testimony concerned when human life commences, the biologic development of the unborn child, certain abortion techniques, and the effect of those techniques on the life of the unborn child. The excluded testimony of the complainant, Ortega, dealt with abortion procedures, abortion counseling, abortion complications, and the clinic's business practices.

In *Hoffart v. State*, 686 S.W.2d 259, 262-63 (Tex. App. – Houston [14th Dist.] 1985, pet. ref'd), the court held that

evidence concerning when life begins, development characteristics of the unborn child, and the effects of an abortion upon an unborn child were irrelevant to the crime of criminal trespass, apparently committed in *Hoffart* at the same clinic as here. Thus, Hotze's and Ortega's testimony was not erroneously excluded.

The excluded testimony of appellants Zakes, Larkin, Rogers, Marsh, and Crabb dealt with the reasons for their acts, i.e., to help pregnant women and to save their unborn children. This, they assert, was necessary to support their three statutory defenses.

We hold that excluding the testimony was not error because no fact issue was raised concerning the aforementioned defenses. *Roy v. State*, 552 S.W.2d 827, 830-31 (Tex. Crim. App. 1977), *rev'd on other grounds, Johnson v. State*, 650 W.W.2d 414, 417 (Tex. Crim. App. 1983).

Penal Code §9.22 provides that criminal conduct is justified by necessity if: (1) the actor reasonably believes that the conduct is immediately necessary to avoid imminent harm; (2) the harm sought to be avoided is clearly greater than the harm sought to be prevented by the statute violated; and (3) a legislative purpose to exclude the justification claimed for the conduct does not plainly appear. Tex. Penal Code Ann. §9.22 (Vernon 1974).

The harm sought to be avoided, abortions, was not clearly greater than the harm caused by the trespass, which was the loss of the constitutional right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973). We decline to hold that these crimes were justified by the necessity of preventing others from exercising their constitutional rights. Because

all requirements of the defense of necessity were not raised, there was no error.

Appellants also contend that the evidence was admissible to support their claim of defense of third person. Texas Penal Code, §9.33 (Vernon 1974) provides:

> A person is justified in using force or deadly force against another to protect a third person if:
>
> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
>
> (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

There was no evidence that unlawful force was being used against the women in the clinic. Moreover, fetuses are not "persons" under Texas law. *See Ogas v. State*, 655 S.W.2d 322, 325 (Tex. App. – Amarillo 1983, no pet.). The term "person" is defined in Texas Penal Code §1.07(a)(27) as "an individual, corporation, or association." "Indivdual" is defined in §1.07(a)(17) as a "human being who has been born and is alive." *Compare Witty v. American General Ins. Co.*, 727 S.W.2d 503 (Tex. 1987) (denying monetary recovery for death of a fetus). Therefore, no evidence supported the appellants' claim to defense of a third person.

Appellants finally contend that their evidence was admissible to support a defense of protection of health or life, under Tex. Penal Code §9.34(b) (Vernon 1974), which provides:

> (b) A person is justified in using both force and deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve the other's life in an emergency.

There was no evidence that force was immediately necessary to preserve any person's life in an emergency. Therefore, the evidence did not establish the elements of the defense of protection of health or life, and the trial court did not err in excluding it.

There being no abuse of discretion, points four through 11 are overruled.

Appellants contend that the trial court violated their rights to free expression under the United States and Texas Constitutions when, as a condition of probation, it ordered them not to picket or demonstrate at the clinic.

The trial court has considerable latitude in establishing the terms and conditions of probation. Tex. Code Crim. P. Ann. art. 42.12 §6(a) (Vernon Supp. 1988). However, appellants argue that they have a constitutional right to demonstrate and picket so long as they do so peacefully and lawfully.

In *United State v. Tonry*, 605 F.2d 144 (5th Cir. 1979), the court upheld a probation condition that prohibited a misdemeanor violator of the Federal Election Campaign Act from engaging in *any* political activity. As a condition of probation, Tonry was required not to "engage in any political activity, be it federal, state, local, municipal of parochial, during the period of probation." The court noted that it had previously upheld conditions of probation restricting a probationer's first amendment rights,

including prohibitions against association with Students for a Democratic Society, members of humanist groups, and the Irish Republican Army. 605 F.2d at 151. The court wrote:

> [T]he no-political-activity condition is tailored to advance both the purposes of the federal election statute and the purposes of the probation act: rehabilitation and protection of the public. Tonry will be deprived of some of his constitutional rights while under probation, but this deprivation is appropriate to the nature of his crimes. It assures that the defendant . . . will not be tempted to engage in illicit electoral activity during his probation, thus serving the purpose of protection. The restriction is not harsh and the district court does not appear to have been unreasonable in determining that the *very limited activity* forbidden to Tonry is one that should not be accorded him during probation even though it is granted to law-abiding citizens. The general purposes of enforcement of the particular criminal law that Tonry violated are served.

605 F.2d 150-51 (emphasis supplied).

Buttressing its conclusion that the restriction involved was "very limited," the court concluded:

> Finally, we note that the condition does not restrict Tonry's first amendment rights totally; it is focused only on politically related activity.

Id. at 152.

Given the greater imposition on constitutional rights that was upheld in *Tonry*, we find no error. The limited restriction here was clearly intended to protect the victim and to increase the likelihood that appellants will avoid revocation of their probated terms of imprisonment.

Point of error 28 is overruled.

The discussion of the remaining points of error does not meet the criteria for publication, Tex. R. Civ. P. 90, and is thus ordered not published.

The judgment is affirmed.

In point of error number three, appellants assert that the trial court erred when it prohibited defense counsel from questioning the venire concerning the defense of necessity, Tex. Penal Code §9.22, the defense of third person, §9.33, and the defense of protection of life or health, §9.34(b).

The record indicates that the trial court granted the State's pre-trial motion in limine that appellants not be allowed to question the venire concerning these defenses. However, the grant or denial of a motion in limine does not constitute reversible error. *Romo v. State*, 577 S.W.2d 251, 252 (Tex. Crim. App. 1979).

The record of the voir dire is not before us showing how appellants' voir dire was restricted. The burden was on the appellants to present a sufficient record of the voir dire. *See Rivera v. State*, 581 S.W.2d 161, 163 (Tex. Crim. App. 1979). Very similar facts presented nothing for review in *Easterling v. State*, 710 S.W.2d 569, 575-76 (Tex. Crim. App. 1986). In order to preserve error, the disallowed question should appear in the record. *McManus v. State*, 591 S.W.2d 505, 520 (Tex. Crim. App. 1979). Because the transcription of the voir dire was not included, the appellants have not demonstrated error. *Ransom v. State*, 630 S.W.2d 904, 907 (Tex. App. – Amarillo 1982, no pet.).

Point of error three is overruled.

Appellants contend that the informations were defective for not alleging the "general locality in the county" of the clinic. *See* Tex. Code Crim. P. Ann. art. 21.09 (Vernon Supp. 1988). We disagree.

Franks v. State, 688 S.W.2d 502 (Tex. Crim. App. 1985), held that art. 21.09 does not apply in burglary cases. Criminal trespass is a lesser included offense of burglary, *Roberson v. State*, 549 S.W.2d 749, 751 (Tex. Crim. App. 1977); therefore, 21.09 does not apply to criminal trespass prosecutions. The motion to quash was not meritorious.

Moreover, the absence of such allegations from the informations did not harm appellants. *See Adams v. State*, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986). At the pretrial motion hearing, the prosecutor stated, without contradiction, that the location was stated in offense reports that defense counsel had seen, that appellants had been arrested at that location, and that the location was 2909 West Loop South, Houston, Harris County, Texas. As in *Adams*, notice was conveyed outside the information.

Finally, appellants claim that the information will not support a jeopardy bar to further prosecution for the same offense because it does not allege the location of the building. The undisputed evidence was that the offense occurred on September 20, 1986, at 2909 West Loop South, Houston, Harris County, Texas. Thus, no further prosecution can occur for trespass to that location on that date.

Point of error number one is overruled.

Appellants next contend that the informations were defective for not alleging the type of notice to depart that

was given and for not stating how they received such notice.

This was a prosecution under Penal Code sec. 30.05, which provides:

> (a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> (1) had notice that the entry was forbidden; or
>
> (2) received notice to depart but failed to do so.
>
> (b) For purposes of this section:
>
> (1) "Entry" means the intrusion of the entire body; and
>
> (2) "Notice" means:
>
> (A) oral or written communication by the owner or someone with apparent authority to act for the owner;
>
> (B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or
>
> (C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

Tex. Penal Code Ann. sec. 30.05 (Vernon Supp. 1988).

Appellants concede that the informations track §30.05(a)(2), but they complain that the informations failed to allege whether the notice was an "oral or written communication," a "fencing or any other enclosure," or a "sign posted on the property," and failed to allege who gave such notice, and how it was given. This, they assert, was essential knowledge in preparing their defense:

A charging instrument need not allege evidentiary facts. *Thomas v. State*, 621 S.W.2d 158, 161 (Tex. Crim. App. 1980) (op. on reh'g), held that the State need not allege facts showing how a theft victim failed to give "effective consent"; nor must the State allege facts showing that a capital murder victim was lawfully acting as a peace officer. *Moreno v. State*, 721 S.W.2d 295, 300 (Tex. Crim. App. 1986). These cases establish that it is the defendant's acts, not the victim's, that must be alleged.

The motion to quash sought evidentiary facts concerning the conduct of someone other than the appellants. Thus, it was not erroneously overruled.

Point of error number two is overruled.

In point of error number 25, appellants complain of fundamental jury charge error because the charge permitted the jury to consider a sign on the clinic's front door restricting entry as evidence of notice to depart under the information. No such objection was made at trial.

Appellants argue that because they were charged under Penal Code §30.05(a)(2), it was error to admit evidence of a sign as a type of notice given under §30.05(b)(2)(C). The statute does not limit the use of the definitions of "notice" to either §30.05(a)(1) or §30.05(a)(2). Moreover, the sign complained of was a "written communication by the owner," under §30.05(b)(2)(A). Finally, appellants have not demonstrated egregious harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g).

Point of error number 25 is overruled.

In points 12 and 13, appellants assert that the trial court erred: (1) by refusing to allow them to elicit information on cross-examination from two State witnesses regarding why Ortega left the employ of the clinic; and (2) by refusing to allow them to make a bill of exceptions in order to preserve error.

During cross-examination by defense counsel, Karen Jones, a clinic employee, testified that Ortega left her position as director of the clinic almost one month after the criminal trespass occurred. The following then transpired:

> [DEFENSE]: Do you know why she left?
>
> [PROSECUTOR]: Objection, Your Honor, it is not relevant, even if she did.
>
> [THE COURT]: I will sustain the objection.
>
> [DEFENSE]: Your Honor, she is a complaining witness in this case, and I think I need to develop something about why she left this particular clinic.

Later, on a bill of exceptions, defense counsel asked Ortega why she left the clinic. A relevancy objection was sustained, and the following later transpired:

> [DEFENSE]: Ms. Ortega, have you been convicted of a crime involving moral turpitude?
>
> [MS. ORTEGA]: No, sir, I have not.
>
> [DEFENSE]: Are you under any investigation –
>
> [MS. ORTEGA]: No, sir, I am not.
>
> [DEFENSE]: – of a crime?
>
> [MS. ORTEGA]: No.
>
> [DEFENSE]: Does the West Loop Clinic operate primarily, I mean, up to the time that you left in October

or the latter part of last year, does it operate primarily with cash?

[MS. ORTEGA]: No credit cards. Money orders.

[DEFENSE]: Do you take checks?

[MS. ORTEGA]: No, personal checks, no. Money orders.

[PROSECUTOR]: Your Honor, he had one question that he wished to ask, and he has asked it.

[DEFENSE]: Your Honor, I'm probing here a little bit. I think that we have got something here.

[THE COURT]: I'm not sure that a bill of exceptions is the right area to do something like this.

[PROSECUTOR]: He is attempting to use the bill of exceptions for discovery, and that is not what it is for.

[DEFENSE]: I'm not trying to use the bill for discovery purposes. We do have this lady's credibility, and that is a key issue in any case.

[THE COURT]: I believe she answered your questions on investigation. You asked whether she was under investigation. I don't believe that we need to proceed further on this bill of exceptions. That is not what the bill is for.

[DEFENSE]: I was trying to go into the credibility aspect.

[THE COURT]: I believe she has probably answered you, Mr. Schmude, on all of that.

[DEFENSE]: Ms. Ortega, from the standpoint of your personal knowledge, up to the time that you were with the West Loop Clinic, did you ever have people that paid for an abortion and then backed out of it?

[MS. ORTEGA]: Yes, yes.

[DEFENSE]: Would you return the money?

[MS. ORTEGA]: Yes, yes.

Great latitude is allowed during cross-examination to show a witness' ill feeling, bias, motive, and animus. *Hurd v. State*, 725 S.W.2d 249, 252 (Tex. Crim. App. 1987). However, the trial court retains discretion in deciding how and when bias may be proved, and what collateral evidence is material for that purpose. *Id.* at 252. In exercising discretion, the trail (sic) court may restrict cross-examination on marginally relevant matter. *Id.*

A court is not required to allow a wide-ranging bill of exceptions for an unstated purpose. Here, counsel stated that his purpose was to attack credibility, but he never stated what facts he expected to reveal or how they indicated bias. Moreover, Ortega's credibility was not important because appellants admitted their acts. Their defense was that they were justified, not that they did not act as alleged. There was therefore no abuse of discretion.

Points of error 12 and 13 are overruled.

In points of error 14 through 18, appellants contend that the trial court deprived them of due process of law by refusing to allow evidence of appellants' beliefs that they were not guilty.

In points of error 19 through 23, appellants contend that the trial court erred in refusing to instruct the jury on their justification defenses of necessity, defense of third person, and protection of life or health.

As stated above, the defenses were not raised by the evidence. Therefore, there was no error. *Hoffart*, 686 S.W.2d at 264.

Points of error 14 through 23 are overruled.

In point of error 24, appellants assert that the trial court erred in refusing to instruct the jury to "consider the evidence concerning each defendant on an individual basis." Instead of that instruction, the trial court presented six separate charges requiring the jury to find, beyond a reasonable doubt, that each defendant had committed criminal trespass.

Appellants argue that appellant Crabb was harmed by the omission of the requested instruction because unlike the other appellants, Crabb was chained to a chair and was unable to leave after notice was given because the key to the chain was outside the clinic.

The appellants, including Crabb, chose to be tried jointly. Moreover, no trial objection mentioned any prejudice unique to Crabb. Thus, the complaint on appeal is not the same as the trial objection.

Where defendants are charged separately but tried jointly, the better practice is to submit separate jury charges. *Gonzalez v. State*, 468 S.W.2d 85, 87 (Tex. Crim. App. 1971). Separate charges help prevent confusion and better enable a jury to reach proper verdicts. *Id.* Because the separate charges presented to the jury accomplished the same thing as the refused charge, refusing the requested charge was not error.

Point of error 24 is overruled.

In point of error 27, Crabb asserts that the evidence was insufficient because it did not show that he was told to leave after his chains were removed, but only before, when he could not do so.

Crabb was chained to a chair in the clinic lobby, and had given the key to someone outside. Thus, Crabb was unable to leave when notice to depart was given. Crabb testified that he intended to be chained to the chair; that he gave away the key to the chain; that he did not want to leave when the notice to depart was given; and that he did not request that the chains be removed when the notice to depart was given.

The critical inquiry is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). From the evidence presented, a rational trier of fact could have found that Crabb voluntarily engaged in conduct that resulted in his continued presence in the clinic after he was given notice to depart.

Point of error 27 is overruled.

Point of error 26 contends that the trial court erred by commenting on the weight of the evidence.

During the State's closing argument the following transpired:

> [PROSECUTOR]: Furthermore, all of the defendants admitted to being there and to performing the conduct which is necessary to prove up the offense of criminal trespass.
>
> [DEFENSE]: Objection, Your Honor. I don't believe they have admitted to the elements of that offense.
>
> [PROSECUTOR]: Your Honor, as I said, as to the conduct necessary in those elements.
>
> [THE COURT]: I will overrule your objection.

The appellants claim that the trial court thus commented on the evidence, in violation of Tex. Code Crim. P. Ann. art. 38.05 (Vernon 1979). However, they failed to object on this ground at trial. Any error was waived. *Crocker v. State*, 573 S.W.2d 190, 205 (Tex. Crim. App. 1978).

Point of error 26 is overruled.

Point of error 29 asserts that the trial court erred in rendering judgment on informations that did not allege offenses under Texas law. The appellants complain that the informations were void because they did not allege who gave notice to depart from the building. No case law supports the claim.

The informations contained all of the elements of Tex. Penal Code Ann. §30.05(a)(2). Thus, they alleged an offense.

Point of error 29 is overruled.

/s/ Murry B. Cohen
Murry B. Cohen
Justice

Justices Smith and Bass sitting.

Publish in part; do not publish in part. Tex. R. App. P. 90.

Judgment Rendered and Opinion Delivered: May 26, 1988

True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

JUDGMENT OF THE COURT OF APPEALS

(May 26, 1988)

(SEAL)

Court of Appeals
First District of Texas

COPY OF JUDGMENT

KEMPER BAKER CRABB, JR.
MICHAEL PATRICK LARKIN
KEVIN JUDGE (sic) [should be JUDE] LARKIN
JON MARSH
RANDY ALLEN ROGERS AND
THOMAS A. ZAKES, APPELLANTS

NO. 01-87-00379-CR		Appeal from the Court of
NO. 01-87-00380-CR		County Criminal Court at
NO. 01-87-00381-CR	VS.	Law No. 5, Harris County,
NO. 01-87-00382-CR		Texas (Tr. Ct. Nos.912,852,
NO. 01-87-00383-CR		912,858,912,859,912,860,
NO. 01-87-00384-CR		912,865,912,867).
		Opinion delivered by
		Justice Cohen, Justices
		Smith and Bass sitting.

THE STATE OF TEXAS, APPELLEE

"The cause came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged, and decreed by the Court that the judgment be in all things **AFFIRMED,** and that the appellant pay all costs in this behalf expended and that this decision be certified below for observance."

Judgment rendered by panel consisting of Justices Smith, Bass and Cohen.

Judgment entered May 26, 1989 (sic) [should be 1988]

ORDER OF THE COURT OF APPEALS OVERRULING MOTION FOR REHEARING

(JUNE 30, 1988)

(SEAL)

ORDER
In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-87-00379-CR
NO. 01-87-00380-CR
NO. 01-87-00381-CR
NO. 01-87-00382-CR
NO. 01-87-00383-CR
NO. 01-87-00384-CR

KEMPER BAKER CRABB, JR., MICHAEL PATRICK LARKIN, KEVIN JUDE LARKIN, JON MARSH, RANDY ALLAN ROGERS, THOMAS A. ZAKES, APPELLANTS

V.

STATE OF TEXAS, APPELLEE

ON MOTION FOR REHEARING

On this day came on to be considered Appellant's motion for rehearing. And such motion is hereby **OVERRULED.**

It is so ORDERED.

PER CURIAM

Panel consists of Justices Smith,
Bass and Cohen

Order entered June 30 1988

True copy attest:
KATHRYN COX
CLERK OF THE COURT

By: /s/ Margie Thompson
MARGIE THOMPSON
CHIEF DEPUTY

OFFICIAL NOTICES FROM THE COURT OF CRIMINAL APPEALS REFUSING PETITIONS FOR DISCRETIONARY REVIEW

(February 22, 1989) (Postmarks excluded.)

February 22, 1989
(SEAL) COA #: 01-88-00379-CR
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No 0883-88
STYLE: Crabb, Jr., Kemper Baker

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

February 22, 1989
(SEAL) COA #: 01-88-00380-CR
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0884-88
STYLE: Larkin, Michael Patrick

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

February 22, 1989
COA #: 01-88-00381-CR

(SEAL)
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0885-88
STYLE: Larkin, Kevin Jude

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

February 22, 1989
COA #: 01-88-00382-CR

(SEAL)
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0886-88
STYLE: Marsh, Jon

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

February 22, 1989
(SEAL) COA #: 01-88-00383-CR
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0887-88
STYLE: Rogers, Randy Allen

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

February 22, 1989
(SEAL) COA #: 01-88-00384-CR
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0888-88
STYLE: Zakes, Thomas N.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

OFFICIAL NOTICES FROM THE COURT OF CRIMINAL APPEALS DENYING MOTIONS FOR REHEARING
(April 5, 1989) (Postmarks excluded.)

April 5, 1989
COA #: 01-88-00379-CR

(SEAL)
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0883-88
STYLE: Crabb Jr., Kemper Baker

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

April 5, 1989
COA #: 01-88-00380-CR

(SEAL)
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0884-88
STYLE: Larkin, Michael Patrick

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

April 5, 1989
COA #: 01-88-00381-CR

(SEAL)
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0885-88
STYLE: Larkin, Kevin Jude

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

April 5, 1989
COA #: 01-88-00382-CR

(SEAL)
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0886-88
STYLE: Marsh, Jon

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

April 5, 1989
(SEAL) COA #: 01-88-00383-CR
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0887-88
STYLE: Rogers, Randy Allan

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

April 15, 19[illegible]
(SEAL) COA #: 01-88-00384-CR
OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0888-88
STYLE: Zakes, Thomas N.

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P.O. Box 674
Tomball, TX 77375